United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7047

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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JUDY C. EGELSTON,

Plaintiff-Appellant,

-against-

STATE UNIVERSITY COLLEGE AT GENESEO; STATE UNIVERSITY COLLEGE OF ARTS AND SCIENCES, DIVISION OF EDUCATIONAL STUDIES, STATE UNIVERSITY OF COLLEGE AT GENESEO; THOMAS COLAHAN, VICE-PRESIDENT FOR ACADEMIC AFFAIRS, STATE UNIVERSITY COLLEGE AT GENESEO; NICK LAGATTUTA, DEAN OF EDUCATIONAL STUDIES, STATE UNIVERSITY COLLEGE AT GENESEO, GENESEO, NEW YORK,

Defendants-Appellees.

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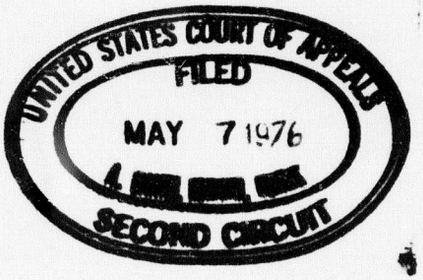

BRIEF FOR DEFENDANTS-APPELLEES

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BRIEF FOR DEFENDANTS-APPELLEES

Counterstatement of Issues Presented

1. Was the complaint properly dismissed for failure to comply with the requirements as to timeliness under 42 U.S.C. § 2000e-5(e)?

2. Was the complaint properly dismissed as to the State corporate agency pursuant to 42 U.S.C. 1983?

3. Did the District Court properly dismiss the action against individual defendants where in the court's judgment plaintiff is presently pursuing an adequate State administrative remedy?

Counterstatement of the Case

Plaintiff appeals from an Order and Decision of the United States District Court for the Western District of New York, per Hon. Harold P. Burke, Judge which dismissed a complaint brought pursuant to 42 U.S.C. § 2000e-5(f) and 42 U.S.C. 1983 and the Fourteenth Amendment of the United States Constitution (A. 146-148).*

The District Court's jurisdiction is asserted in the complaint under 28 U.S.C. §§ 1331, 1343, 2201 and 2202 and 42 U.S.C. § 2000e-5(f) (A. 3). Plaintiff sought a declaratory judgment that defendants discriminated against her on the basis of her sex by their failure to renew her teaching contract at the State University College at Geneseo. In addition, the action sought compensatory damages in the amount of $2,000,000 and injunctive relief (A. 12-15).

* References are to the Joint Appendix.

The plaintiff, Judy C. Egelston, was hired by the State University College at Geneseo in September 1970, as an assistant professor in the Division of Educational Studies. She was notified that her contract would not be renewed on or about May 15, 1972 and thereafter was terminated at the expiration of the contract in June 1973 (A. 4). By letter dated January 24, 1973 (more than 180 days after receiving notice of her non-renewal) plaintiff requested the office of Federal Contract Compliance, Department of Labor, to conduct a compliance review of State University College at Geneseo; no individuals were mentioned in the letter (A. 104). This request was referred to the Department of Health, Education and Welfare (HEW)(A. 105-109). Thereafter, HEW inquired of Ms. Egelston as to whether she had filed an individual or a class complaint explaining that if it was the latter HEW would retain jurisdiction whereas if it was an individual complaint it would be referred to Equal Employment Opportunity Commission for disposition (A. 111). Ms. Egelston replied on December 4, 1973: "I. . .request that you pursue the investigation as a class complaint. As I mentioned last spring, the N.Y. State Division of Human Rights has been handling the sex bias complaint on my

individual claim". (A. 112) This latter complaint had been filed on February 9, 1973 after her letter to OFCC (A. 42). On or about June 20, 1974 plaintiff filed a complaint with EEOC which purported to relate back to the letter addressed to OFCC requesting a compliance review (A. 116-127). After initially refusing to take jurisdiction, the EEOC reversed itself and deemed the complaint filed in June 20, 1974 as actually filed January 24, 1973 (A. 129). Thereafter plaintiff was issued a right-to-sue letter from the Justice Department and commenced the instant action in the District Court (A. 130, 131).

Upon a motion to compel discovery, defendants cross-moved to dismiss on the grounds that plaintiff's Title VII claims were not properly perfected since they had not been filed within the 180 day time limitations imposed by § 2000e-5(e); and that the State of New York as the real party in interest and its corporate agencies were not persons within the meaning of 42 U.S.C. 1983; and that as to the individuals named in their representative capacity the plaintiff had an adequate state administrative remedy which is presently being pursued (A. 95-103). The District Court granted defendants' cross-motion to dismiss and plaintiff has taken this appeal.

POINT I

THE COMPLAINT PURSUANT TO TITLE VII WAS PROPERLY DISMISSED FOR FAILURE TO COMPLY WITH THE JURISDICTIONAL PREREQUISITES OF 42 U.S.C. 2000e-5(e)

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(e) provides:

> (e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

The District Court below found that in the circumstances of the case below the applicable time limitation, derived from the above quoted provision, 42 U.S.C. 2000e-5(e), was one hundred and eighty days after the alleged unlawful employment practice occurred. The plaintiff cannot have it both ways. If the plaintiff relies upon the January 24, 1973 letter to OFCC Department of Labor (subsequently referred to HEW), as the operative date of filing, that letter preceded any filing with the State agency (the State agency complaint was filed on February 9, 1973) and therefore plaintiff cannot claim that the three hundred day period applies since such a period requires an initial filing with a State or local agency. If, for reasons more fully set forth below the plaintiff's letter to OFCC (A. 104) is not regarded by the court as sufficient under the requirements 42 U.S.C. 2000e-5(e) and the EEOC regulation 29 C.F.R. § 1601.11, then more than three hundred days had elapsed before a legally sufficient complaint was filed with EEOC on January 24, 1974.

The complaint alleged that the plaintiff received notice of non-renewal of her contract due to expire June 1973, on or about May 15, 1972. Plaintiff had no contact with any federal agency, Department of Labor or HEW

until her letter of January 23, 1973 (A. 104) more than 180 days after she received notice that her contract would not be renewed. Moreover, the letter received by HEW merely requested that a compliance review of the State University College at Geneseo be conducted, it made no reference to any individual defendants.

Additionally, 29 C.F.R. § 1601.11 provides:

"§ 1601.11 Contents; amendment.

"(a) Each charge should contain the following:

"(1) The full name and address of the person making the charge.

"(2) The full name and address of the person against whom the charge is made (hereinafter referred to as the respondent).

"(3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practice.

"(4) If known, the approximate number of employees of the respondent employer or the approximate number of members of the respondent labor organization, as the case may be.

"(5) A statement disclosing whether proceedings involving the alleged unlawful employment practice have been commenced before a State or local authority charged with the enforcement of fair employment practice laws, and, if so, the date of such commencement and the name of the authority.

> "(b) Notwithstanding the provisions of paragraph (a) of this section, a charge is deemed filed when the Commission receives from the person making a charge a written statement sufficiently precise to identify the parties and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including failure to swear to the charge, or to clarify and amplify allegations made therein, and such amendments alleging additional acts which constitute unlawful employment practices directly related to or growing out of the subject matter of the original charge will relate back to the original filing date."

Plaintiff's letter of January 24, 1973 requesting a compliance review (A. 104) falls far short of the regulation (29 C.F.R. § 1601.11) promulgated by the Equal Employment Opportunity Commission. Further it is quite clear that if plaintiff's letters of January 24, 1973 and December 4, 1973 are read together there can be little doubt that plaintiff did not herself consider that she was seeking a federal remedy for her alleged discriminatory non-renewal. She regarded her complaint based on the alleged discriminatory non-renewal to be pending before the New York State Division of Human Rights (A. 112).

These facts amply demonstrate plaintiff's letter to HEW did not confer jurisdiction upon EEOC to entertain the charge or to allow plaintiff to file an amended charge on June 24, 1974 since even the letter to HEW on January 24, 1973 was untimely under 42 U.S.C. § 2000e-5(e). It is incumbent on plaintiff to comply with the statutory conditions precedent which would confer jurisdiction upon the district court to entertain the action. In this case the complaint is untimely since it was not filed with the state agency within 180 days of the alleged act of discrimination so as to entitle plaintiff to the benefit of the extended 300 day limitation period for filing charges with the EEOC. Olson v. Rembrandt Printing Co., 511 F. 2d 1228 (8th Cir. 1975).

As the Circuit Court of Appeals stated in a discussion of § 2000e-5(e) apposite to the instant case:

> In § 2000e-5(e), Congress in 1972 adopted a 180-day period within which a claim must be filed with the EEOC. The one exception to this 180-day period is that a complainant with a state or local remedy is given 300 days in which to file a complaint with the EEOC provided he has initially instituted proceedings with a State or local agency."

* * *

> Thus a charge of employment discrimination must be filed within 180 days whether or not the complainant is in a deferral state. If in a deferred state it must be filed with the state or local agency within 180 days. The complainant is then given the extended period for filing with the EEOC to allow him to pursue his state claim without waiving possible relief under the Federal act.
>
> Olson v. Rembrandt, supra 511 F. 2d 1228, at 1232, 1233

The decision by the EEOC reversing itself and entertaining jurisdiction of an otherwise untimely complaint is not binding on the district Court. Cisson v. Lockhead-Georgia Co., 392 F. Supp. 1176 (D.C. Ga. 1975).

Appellant seeks to avoid the effect of such holdings by contending that her complaint charges "continuing discrimination" and therefore "the statute of limitations has not even commenced to run with respect to filing under Title VII" (Appellant's Brief at p. 13). But as the Circuit Court said in Olson v. Rembrandt Printing Co., supra at p. 1234, "to construe loosely 'continuing' discrimination would undermine the theory underlying the statute of limitations. While the continuing discrimination theory may be available to present employees. . .we do not think this theory has validity when asserted by a former employee."

The plaintiff-appellant received notice of non-renewal of her contract on May 15, 1972, her complaint should therefore have been timely filed in relation to that date when her cause of action based on such alleged discriminatory non-renewal arose.

The non-renewal of plaintiff-appellant's contract is analagous to many similar acts of alleged employment discrimination which have been held as not constituting continuing acts. A typical layoff, without more, is not a continuing act. Griffin v. Pacific Maritime Association, 478 F. 2d 1118, 1120 (9th Cir. 1973); Burney v. North American Rockwell Corp., 302 F. Supp. 86, 92 (C.D. Cal. 1969). The discontinuance of a job assignment or classification is not a continuing act but is completed when effected. Hutchings v. U.S. Industries, Inc., 309 F. Supp. 691 (E.D. Texas, 1969), reversed on other grounds, 428 F. 2d 303 (5th Cir. 1970). An alleged discriminatory job transfer is not a deemed a continuing act. Guerra v. Manchester Terminal Corp., 350 F. Supp. 529 (S.D. Texas 1972); Younger v. Glamorgan Pipe and Founding Co. 310 F. Supp. 195, 197 (W.D. Va. 1969). Nor is a failure to promote a continuing event. Culpepper v. Reynolds Metals Co., 296 F. Supp. 1235 (N.D. Ga. 1969).

Moreover, there is no authority to the effect that a failure to rectify an alleged unlawful act converts it into a continuing transaction or suspends the period of limitation for filing. Hutchings v. U.S. Industries, 309 F. Supp. 691, 693 supra; Culpepper v. Reynolds Metal Co. supra at p. 1235. In any event, whether plaintiff-appellant alleges continuing discrimination or an isolated incident of discrimination, the timeliness requirements of the statute apply to all types of discrimination. As the Court stated in Love v. Pullman, 430 F. 2d 49 (10th Cir. 1970):

> The sequence and time period is applicable under the statute to all types of allegedly unlawful discrimination. It does not differentiate between continuing discrimination and isolated incidents. The familiar 'continuing violation' argument advanced by appellant and the EEOC would permit a complaint to be initially filed with it at any time whatever as to a continuing offense and the elements of the act considered above would thereby be destroyed.
>
> Love v. Pullman, supra at p. 54, reversed on other grounds, 404 U.S. 522 (1972)

The untimely filing of the complaint with both State and Federal agencies in the instant case (after more than 180 days after the notice of non-renewal) constituted

a failure to satisfy a jurisdictional precondition to suit in the federal court. Olson v. Rembrandt Printing Co., 375 F. Supp. 413 supra; Dudley v. Textron, Inc. Burkart-Randall Division, 386 F. Supp. 602 (D.C. Pa. 1974); Harris v. Sherwood Medical Industries, Inc., 386 F. Supp. 1149 (D.C. Mo. 1974). The district court, therefore, properly dismissed the complaint under 42 U.S.C. 2000e-5(e).

POINT II

THE DISTRICT COURT PROPERLY DISMISSED THE COMPLAINT FOR FAILURE TO STATE A CLAIM UNDER 42 U.S.C. 1983

A.

The District Court below held that "[t]he defendant State University of New York, College of Arts and Services, is a corporate agency within the Education Department created to carry out governmental functions of the State in higher education. It is an alter ego of the State and immune from suit, except to the extent that the State has waived its immunity. The State of New York is the real party defendant. The State is not a 'person' within the meaning of 42 U.S.C. 1983. Monroe v. Pape, 365 U.S. 167."

As to the defendant State University, it is too well-settled to require further elaboration here, that the State, its political subdivisions and corporate agencies are not "persons" within the meaning of 42 U.S.C. 1983. Monroe v. Pape, 365 U.S. 167 (1961); Zuckerman v. Appellate Division, Second Dept., Sup. Ct. of the State of New York, 421 F. 2d 625 (2d Cir. 1970); Clark v. Washington, 366 F. 2d 678, 881 (9th Cir. 1966); Williford v. California, 352 F. 2d 474, 476 (9th Cir. 1965); Guelich v. Mounds View Independent Public School Dist. No. 621, 334 F. Supp. 1276 (D.C. Minn. 1972).

B.

It remains to consider whether the District Court had a sufficient basis for the exercise of its discretion in dismissing the action as against the two individual defendants sued in their representative capacities as state agents upon the ground that "[t]he plaintiff has an adequate remedy under State law which is presently being pursued."

While there is no longer a strict requirement that plaintiff in civil rights cases brought under 42 U.S.C. 1983 exhaust state administrative remedies, neither can it be said that District Courts must in all such cases entertain jurisdiction rather than decline or defer jurisdiction under the exhaustion or abstention doctrines. This court's discussion of the issue in Eisen v. Eastman, 421 F. 2d 560, 568, 569 (2d Cir. 1969) is most apposite here. Cautioning against a trend which would provoke plaintiffs in civil rights cases to "turn their backs on state administrative remedies and rush into a federal forum" this circuit in Eisen said:

> Exhaustion of state administrative remedies is not required where the administrative remedy is inadequate, as in McNeese, or where it is certainly or probably futile, as in Damico, Smith and Houghton. A quite different situation would be presented, for example, when a complaint alleged that a subordinate state officer had violated plaintiff's constitutional rights by acting because of bias or other inadmissible reasons. . .and the state has provided for a speedy appeal to a higher administrative officer. . ."
>
> Eisen v. Eastman, 421 F. 2d 560, 569

The District Court's decision herein is entirely consonant with this Court's reasoning in Eisen. In the instant case the state administrative forum acted speedily to investigate plaintiff Egelston's complaint, found probable cause and ordered the matter to public hearing. The District Court was not clearly erroneous in finding that the plaintiff has an adequate state remedy presently being pursued. The court decision to dismiss the action as against the individual defendants was a proper exercise of the Court's discretion. Eisen v. Eastman, 421 F. 2d 560, 569 (2d Cir. 1969) cert. den. 400 U.S. 841 (1970); Drown v. Portamouth School Dist., 435 F. 2d 1182, 1186 n. 10 (1st Cir. 1970) cert. den. 402 U.S. 972 (1971); see also Raper v. Lucey, 488 F. 2d 748 (1st Cir. 1973); Palmigiano v. Mullen, 491 F. 2d 978 n. 4 (1st Cir. 1974).

This circuit has recently reaffirmed the rule of Eisen requiring exhaustion in certain cases like the instant one. Fuentes v. Roher, 519 F. 2d 379 (2d Cir. 1975); Cordova v. Reed, 521 F. 2d 621 (2d Cir. 1975).

CONCLUSION

FOR ALL OF THE FOREGOING, THE DECISION OF THE DISTRICT COURT DISMISSING THE COMPLAINT SHOULD IN ALL RESPECTS BE AFFIRMED

Dated: New York, New York
May 7, 1976

Respectfully submitted,

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Attorney for Defendants-
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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MARY KO , being duly sworn, deposes and says that She is employed in the office of the Attorney General of the State of New York, attorney for defendants-appellees herein. On the 6th day of May , 1976, she served the annexed upon the following named person :

EMMELYN LOGAN-BALDWIN
Attorney for Plaintiff-Appellant
Office and P.O. Address
510 Powers Building
Rochester, New York 14614

Attorney in the within entitled action by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by her for that purpose.

Mary Ko

Sworn to before me this
6th day of May , 1976

Dominick Tumminaro
Assistant Attorney General
of the State of New York